Supreme Court, U.S.
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No. 95-462 SEP 18 1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GREGORIO MENA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a prosecutor's improper burden shifting, in *repeatedly* urging the jury that there was *no evidence* that the defendant did *not* commit the crime, was plain error, pursuant to the decisions of this Court, where:

a) *The* central question was whether the defendant was knowingly involved with a drug organization;

b) The defendant was acquitted of three out of four counts;

c) Other prosecutorial misconduct admittedly occurred; and

d) The Government's proof on knowledge relied entirely on the testimony of two cooperating witnesses.

II. Whether a sentence in excess of twenty years in jail may be imposed, consistent with due process, where the evidence as to the quantity does not meet the DEA's *own* definition of what constitutes "reliable" proof.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Gregorio Mena, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case or, in the alternative, for summary reversal and remand based on the violations of Petitioner's constitutional rights as set forth herein.

OPINIONS BELOW

The decision of the Court of Appeals was issued without opinion on April 26, 1995, pursuant to 11th Circuit Rule 36-1. (App. A, *infra*, 1a.) The opinion of the District Court is unreported. (App. B, *infra*, 2a.) The decision denying Petitioner's timely Petition for Rehearing was also rendered without opinion. (App. C, *infra*, 11a.)

JURISDICTION

The jurisdiction of this Court is invoked as set forth above and under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the parameters of a fair trial pursuant to the due process clause of the Fifth Amendment to the United States Constitution.

STATEMENT

Mena was charged with four counts arising from a single cocaine-importation scheme.[1] (App. B, *infra*, 2a.) The indictment charged: (1) conspiracy to import cocaine (21 U.S.C. § 952(a)); (2) unlawful importation of cocaine (21 U.S.C. §§ 952(a) & 960(a)(1), (b) and 18 U.S.C. § 2); (3) conspiracy to possess with intent to distribute cocaine (21 U.S.C. § 841(a)(1)); and (4) possession with intent to distribute cocaine (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2).

At trial the most crucial issue, relevant to all four counts, was whether Mena "knew" of the cocaine hidden in secret compartments on a boat on which he travelled, or of any conspiracy to import or possess cocaine . If there was reasonable doubt on this issue, then the Government would fail to prove its case as to all four counts. If it carried its burden on this issue, it would probably gain a conviction on all four counts.

The Government's case was not strong. Mena's fingerprints were not found on any of the packages of cocaine. There were no surveillance photos or films of Mena build-

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[1] Because the Court of Appeals affirmed without opinion most of the citations to the record which follow are to the record on appeal and are there for Respondent's convenience. Mindful of the directions in the rules, that the Court will ask for any part of the record it requires, and that the items in the appendix should be kept to a minimum, Petitioner did not attempt to recreate that record in the Appendix.

ing the hidden compartments. He made no confessions or statements to independent parties that he knew of the cocaine or any plan to import it. Nor was there any evidence of possession or use of cocaine, or any other illegal substance, in his car or home.

In support of its case that Mena was a knowing participant, the Government could only offer the testimony of two convicted criminals who received reduced sentences in exchange for their testimony—Valcourt-Diaz, a co-defendant, and Tomas Garcia, a defendant in a related case. *See generally*, R5-Trnscpt (Garcia) and R7-Trnscpt (same) and R9-Trnscpt (Valcourt-Diaz). And even these witnesses's testimony demonstrated that it was not unusual in their drug organization for a person who knew nothing about the cocaine to be brought along for the ride. *See, e.g.*, R9-Trnscpt 101 (Valcourt-Diaz). On cross examination both witnesses admitted to habitually lying. *See, e.g.*, R6-Trnscpt-40-41; 59; 60-61; 75 (Garcia) (admitting to numerous incidents of lying) and R9-Trnscpt 130-36 (Valcourt-Diaz) (admitting to numerous instances of lying including perjury in this case). Mena also presented alibi evidence that he was in Miami, working on another job at the time when Garcia claimed Mena was supposedly involved in another cocaine run. (Testimony of Mrs. Reboso).

In addition, Mena offered affirmative evidence in support of his claim that he did not know anything about the hidden cocaine. For example, he offered the testimony and affidavit of Harry Morales,[2] Government witness, which established that when Morales first spoke to the Government, almost a year before the indictment, he made no mention of Mena's alleged involvement. *See* Motion for New Trial at 3-7 and citations therein. Furthermore, Morales swore in this earlier affidavit that he,

[2] Mena offered the testimony of several other witnesses in his defense, but Morales was the most important. The remainder are not reviewed in detail here.

"Tony" (a co-defendant) and Valcourt-Diaz had done all the work on the ice hold area where the hidden cocaine was located. *Id.* This testimony, as well as that of other witnesses, corroborated Mena's claim of non-involvement. Other witnesses's testimony demonstrated that there were many other people who worked on the boat, or who provided services, who were also not "in the know," a point that the Government conceded. *See* Government's Brief on Appeal at 4.

Mena also offered evidence that, during the year that elapsed between the discovery of the cocaine and his arrest, he was living openly in Miami with his family, making no attempt to conceal his whereabouts. *See* R1-50 (Motion to Amend Conditions of Release) and R1-52 (Renewed Motion to Amend Conditions of Release). He was only arrested when he was *re-entering* this country after a trip to the Canadian side of the Niagara Falls while on a family vacation. *Id.*

In short, there was evidence supporting Mena's position. Nevertheless, the prosecutor, not once, *but six times*, urged the jury that "There is *no* evidence in this case that Mr. Mena was *not* involved in it." R6-Trnscpt at 22 (emphasis added). This was not only factually incorrect, but it also improperly shifted the burden to Mena to prove he was *not* involved. The trial court found that this conduct, as well as other conduct, amounted to prosecutorial misconduct, but that any error was harmless. (App. B, *infra*, 9a.)

The jury acquitted Mena of three of the four counts, including the two conspiracy counts. It convicted him of the one importation count.

After the conviction, sentencing was set for September 1993. Prior to sentencing, Mena filed a notice of Objections to the Presentence Investigation ("PSI") report. R2-203. Mena argued that the testing to determine the quantity of cocaine seized in this case was unreliable because it was based on too small a sample, pursuant to the

Drug Enforcement Administration's ("DEA") published procedure, given that a "dummy" package was found.

The DEA Chemist initially chose a sample of 28 packages out of a total of approximately 750 packages. When one of these packages tested negative for cocaine she tested two more packages. However, the DEA's testing procedure applicable at sentencing provided that she should have tested *an additional 71 packages* in order for the test to reliably predict the total quantity of cocaine for a total population that large. *Id.* at 2. The trial court nevertheless rejected Mena's arguments and sentenced him at an Offense Level 40, which is the offense level specified by the Sentencing Guidelines for offenses involving more than 500 kilograms of cocaine. *See* U.S.S.G. § 2D1.1(a)(3) and accompanying Drug Quantity Table at (2) ("At least 500 KG but less than 1500 KG of Cocaine . . . ."). Therefore, Mena was sentenced to of 292 months (24 years and 3 months, to be followed by 5 years of supervised release.

REASONS FOR GRANTING THE WRIT

I. THE PROSECUTOR'S MISCONDUCT IN THIS CASE IS IN DIRECT CONTRAVENTION OF THE PRIOR PRONOUNCEMENTS OF THIS COURT THAT IT IS NEVER PROPER TO SHIFT THE BURDEN OF PROOF TO THE DEFENDANT AS TO AN ESSENTIAL ELEMENT OF THE GOVERNMENT'S CASE

A. Improper Burden Shifting

Gregorio Mena, a 55-year old carpenter with no previous criminal record, is currently serving a sentence of over 24 years because he could not convince a jury of a negative—in the face of the prosecutor's repeated insistence that it was somehow his job to do so—i.e., that he had no knowledge of any conspiracy to import cocaine.

There was only one issue in this case crucial to conviction—knowledge, knowing participation. The question

was—did Mena knowingly participate in a conspiracy to import cocaine? Or was Mena merely an unwitting hired hand, deliberately brought along[3] on the trip to act as insurance that the conspirators could obtain reduced sentences for themselves (in the unlucky event of capture) by offering up their testimony against the one member of the group who would almost certainly plead not guilty—the one who didn't know anything?

Whenever a defendant primarily challenges the sufficiency of the Government's evidence regarding the essential mental element of a crime, burden of proof and the reasonable doubt standard are crucial. Proof of *lack* of knowledge is never easy. As a consequence, ensuring that the jury clearly understands that defendant has no burden to prove *lack* of knowledge is often outcome determinative.

> There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of [proof] . . . beyond a reasonable doubt.

In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) (quotation omitted).

In a criminal case, the Government has the burden to prove *every* element of the crime beyond a reasonable doubt.

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[3] Mena's presence on the boat is of limited significance given that the cocaine was so well hidden it took U.S. law enforcement several days to locate the cocaine, after Bahamian authorities searched for two days without success. (R13—Trnscpt 123-28; 201-02 and F16 Trnscpt 45-46). *See, e.g., United States v. Vidal-Hungria*, 794 F.2d 1503, 1513-26 (11th Cir. 1906) (mere presence is of limited evidentiary value to prove guilty knowledge in a hidden compartment case).

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. at 364, 90 S.Ct. at 1073. This burden of proof never shifts to the defendant. *Mullaney v. Wilbur*, 421 U.S. 684, 701-703 & n.31, 95 S.Ct. 1881, 1890-1892 & n.31, 44 L.Ed.2d 508 (1975). *But see Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (a criminal defendant may be charged with the burden of proof of an affirmative defense).

Nevertheless, the prosecutor was permitted to repeatedly ask the jury to consider the evidence that Mena had *not* produced.

> There is *no evidence* in this case that Mr. Mena was *not* involved in it.

R6-Trnscpt at 22 (emphasis added).

> There is *no evidence* that Mr. Mena did *not* participate in this cocaine load. There is absolutely *no* evidence that he didn't.

Id. at 24 (emphasis added).

> But remember, based on the evidence. And there's absolutely *no* evidence in this case that Mr. Mena was *not* involved in this.

Id. at 25 (emphasis added).

> There's *no* evidence in this case that Mr. Mena was *not* involved, *absolutely none.*

Id. at 81 (emphasis added).

> There's *no* evidence in this case that Mr. Mena was *not* involved. *None.* And no matter how much

> diversion, how much rabbit trails that the defense tries to present to you, the truth is the truth.

Id. at 87 (emphasis added).

The trial court agreed that these comments were improper.[4] (*See* App. B., *infra,* 9a.)

B. Plain Error—Not Harmless Beyond a Reasonable Doubt

The test for whether particular prosecutorial misconduct entitles a defendant to a new trial is whether the misconduct complained of subjected the defendant to actual and substantial prejudice. *United States v. Frady,* 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). A "judgment may stand only when there is *no reasonable possibility* that the misconduct complained of might have contributed to the conviction." *United States v. Hastings,* 461 U.S. 499, 506, 103 S.Ct. 1974, 1979, 76 L.Ed.2d 96, 104 (1983) (emphasis added). Stated another way, "when there exists a *reasonable possibility* that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, *that verdict must be set aside.*" *Francis v. Franklin,* 471 U.S. 307, 323 n.8, 105 S.Ct. 1965, 1976 n.8, 85 L.Ed.2d 344 (1985) (emphasis added).

In this case it is difficult to see how one could *fail* to find a reasonable possibility that these errors contributed to the conviction. First, the jury acquitted Mena of three counts which were predicated on the same facts. Due to the nature of the charges, if the jury found sufficient facts to prove knowledge as to one, it should have found Mena

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[4] The prosecutor also improperly linked "reasonable doubt" to "frivolous" doubt, one which "those people," not the jury, attach to "anything" or one that is *not* found by "objective" people, like the sitting jury. The trial court found this comment improper as well. (App. B, *infra,* 9a.) *Cf. Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

guilty on all counts. And if there was insufficient evidence to convict on those three, it is difficult to understand how the jury could have concluded he was guilty of the one importation count.

Second, the only evidence going to the most crucial issue—knowledge—was the testimony of criminal defendants who were cooperating with the Government in exchange for reduced sentences. As Justice Jackson noted in writing for the majority in *On Lee v. United States,* 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952), "[t]he use of informers, accessories, accomplices, false friends, or any other betrayals which are 'dirty business' may raise serious questions of credibility." *Id.* 343 U.S. at 747, 72 S.Ct. at 973. "A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system." *Id.* In this case, these witnesses's testimony was not just doubtful based on their *status* as as cooperating witnesses, but was also actually tested and exposed as being filled with falsehoods, contradictions, weaknesses and implausibilities.

Despite its finding that misconduct had occurred the court found any error harmless. (App. B, *infra,* 9a-10a.) A review of the court's reasoning for this holding reveals it was unfounded and clearly erroneous.

First, the court concluded that because this misconduct occurred in a multi-day trial its effect was diluted. *Id.* at 10a. Petitioner respectfully disagrees. The trial only lasted about a week and a half. And even much of this length was taken up, as usual, with arguments made to the court without the jury and pretrial motions. Furthermore, because the principal misconduct complained of occurred in closing, if anything, the effect of this misconduct was concentrated. The improper burden shifting was undoubtedly the last thing echoing in the jury's minds.

Second, the trial court found that because the remarks were objected to and the jury was given a curative instruction any harm was cured. *Id.* This finding is not borne out by the record. In fact, the only one of the improper comments to which an objection was made was the remark equating "reasonable doubt" with "frivolous doubt." *See supra,* note 3. And in response to that objection, the court merely said, "I will instruct the jury what the law is and they'll follow my instruction." R6-Trnscpt at 9-1.

The six references to the lack of evidence that Mena did not do it were not objected to,[5] nor was any curative instruction ever given on these comments. *Cf. Greer v. Miller,* 483 U.S. 756, 107 S.Ct. 3102, 3109, 97 L.Ed.2d 618 (1987) (fact that misconduct consisted of a single question, followed by immediate objection and two curative instructions, contributed to the Court's finding error harmless). This jury was never told they should ignore the prosecutor's comments, that there was no duty *whatsoever* for Mena to produce evidence that he didn't do it, whether by his own testimony or in any other way.

Furthermore, to the extent these comments ignored the evidence that *had* been adduced, they acted as a comment on Mena's assertion of his right not to testify—as if to say, "If he didn't do it, why hasn't he told you so?" *See, e.g. Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (holding that prosecutors may not make comment on a defendant's post-arrest silence). Of course, this is completely improper and in violation of Petitoner's rights and was left uncorrected by any instruction from the court.

Third, the court held that the attacks on defense counsel[6] in the Government's rebuttal were "invited" by im-

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[5] Mena maintains that these comments were plain error for which a contemporaneous objection is unnecessary.

[6] Although the attacks on defense counsel are not detailed here, the issue was raised in Mena's Motion for a New Trial, and the

proper argument by defense counsel. (App. B, *infra*, 10a.) However, the first three times the prosecutor indicated that there was no evidence that Mena *didn't* do it were in his initial summation, before counsel for defense had said anything. It is impossible for these comments to have been "invited" by defense counsel's argument.

Fourth, the District Court held that the weight of the evidence was against the defendant. *Id.* Petitioner disagrees. That issue has been discussed at length above and does not need to be reiterated.

Finally, the trial court held that similar comments by a prosecutor had been upheld by the 11th Circuit in *United States v. Hendreith*, 922 F.2d 748 (11th Cir. 1991) (*per curiam*). *Id.* The mere fact that a particular statement was harmless error in one case does not lead to the presumption that a similar comment in a different case must also, therefore, be harmless error. This Court has repeatedly cautioned against setting up *per se* rules in the area of prosecutorial misconduct. Instead, it has held that "when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the *entire* record."[7] *United States v.*

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trial court found the misconduct had occurred. (App. B, *infra*, 7a-9a.) Therefore, this factor should be given some weight in analyzing the overall question of whether Mena received a fair trial.

[7] For this reason, Petitioner also briefly points to the prosecutor's perjury threats to, and intimidation of, defense witness Harry Morales. (App. B, *infra*, 3a-6a.) The Court held that this claim was without merit because Morales' testimony 'dispelled the impression that only Morales, Miguel and Tony worked on the hidden compartments and that Mena had not." (App. B, *infra*, 5a.) Petitioner respectfully disagrees. Morales didn't create an "impression" that needed to be "dispelled." Morales affirmatively swore in the affidavit and at trial that only he, Miguel and Tony worked on the compartment area. At trial he further testified that Mena wasn't there when they were doing the "divisions." Then he changed that testimony after the perjury threat by the prosecutor. However, even that changed testimony did not go as far as the court suggests.

Young, 470 U.S. 1, 16, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985) (emphasis added).

In addition, *Hendreith*, is distinguishable. In *Hendreith* there was a great deal of evidence against the defendant. Hendreith, who had been charged and convicted of conspiracy to pass counterfeit notes and of receiving counterfeit notes with the intent to pass them off as genuine, had apparently negotiated their transfer in a sting operation. 911 F.2d at 749. Nor was Hendreith acquitted on any other counts.

Review of the above reveals there was no basis for the court's finding that the prosecutor's repeated improper burden shifting was harmless error. Mena should have received a new trial. Instead, the error in obtaining his conviction was compounded and exacerbated by a sentencing error that turned a bad dream into a nightmare.

II. PETITIONER WAS DEPRIVED OF DUE PROCESS BY A SENTENCE WHICH WAS NOT BASED ON A RELIABLE EVIDENCE

A. Testing Was Unreliable

Mena was sentenced to over 24 years in prison. At his age and health, this is a life sentence. This sentence was predicated on the Sentencing Guidelines which calibrate the length of a sentence to the amounts of contraband involved in the case. It is a stairstep and, as such, the lines of demarcation are somewhat arbitrary. That is, there is no particular rational basis for distinguishing between 499 kilos of cocaine, and 500 kilos of cocaine, but 500 kilos results in a substantially more severe sentence.[8]

[8] Taken as a whole, however, Petitioner does not claim that quantity is not rationally included as a factor in the Sentencing Guidelines. Similarly, it is clear that once this connection is made, that without a schedule, which is necessarily somewhat arbitrary, sentencing results would probably vary to an intolerable degree. Nevertheless, because distinctions between different amounts at each level, in combination with statutory mandatory minimums,

In this case, the Government seized 747 packages of what appeared to be cocaine and selected 28 packages for sampling. While 27 of these 28 packages tested positive for cocaine, one did not. That package looked like the others. It contained a white powdery substance like the others. But, unlike the others, it contained only benzocaine and caffeine, not cocaine. In the wake of this surprising result, two more packages were selected for sampling, both of which tested positive.

In selecting two additional samples after finding one "dummy" package, the DEA chemist implicitly acknowledged that *finding one "dummy" undermined the reliability of any prediction as to the total quantity*. However, this second sampling was grossly inadequate. The applicable DEA testing procedure requires that when a "dummy" package is found in an exhibit consisting of between 591 and 770 containers, *an additional 71 containers must be tested*, of which 68 must test positive, *see* SR-Defendant's Exhibit 2 (Table 2, col. 2), or the testing "objective" is not achieved. *Id.* at 2(b)(ii).

In this case the DEA chemist did not test more packages because the DEA's guidelines *at the time the tests were performed* made no provision for the appearance of "dummies." *See* SR-Defendant's Exhibit 2 at 1 (1988 Procedure). Apparently, they did not because the appearance of such "dummies" had only recently been identified as a problem undermining the reliability of the old procedure. The current testing procedure was in place prior to Mena's sentencing and should have been applied. *See* SR-Defendant's Exhibit 2 at 2 (1991 Procedure).

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make significant differences in the length of the sentence, it is particularly important that these calculations are made with some degree of precision before a sentence is imposed. *See, e.g., United States v. Neal*, 46 F.3d 1405 (7th Cir. 1995), *cert. granted*, —— U.S. ——, 115 S. Ct. 2576, 132 L.Ed.2d 826 (June 19, 1995) (illustrating dramatic differences in sentences imposed for LSD depending on the methodology used for determining quantity).

The Government offered instead a special analysis, performed especially for this case, which purported to show that, despite the inadequacy of the second sample size, the DEA could still say with a 97.6% level of confidence that the exhibit contained at least 500 kg of cocaine. *See* SR-Government's Exhibit 1 at 2. However, under the official procedure, even if one assumes a total exhibit of 500 kilos instead of 747, if one negative is observed in the first sample, an additional 70 containers must be sampled, out of which 67 must test positive.[9] *See* SR-Defendant's Exhibit 2. Reducing the total to 500 only reduces the second sample size by one container!

The official DEA testing procedure is based on a hypergeometric probability distribution. *See* SR-Defendant's Exhibit 3 (Frank, Hinkley and Hoffman,[10] *Representative Sampling of Drug Seizures in Multiple Containers,* 36 J. FORENSIC SCIENCE 350, 351 (March 1991)). The special analysis performed especially for this case also purports to be predicated on a hypergeometric probability distribution. But the Government never offered any explanation for the discrepancy between the two conclusions.

Although the change in the procedure between 1988 and 1991 obviates any concern that the Government was negligent at the time of the original testing, it has no bearing on the underlying reliability of the results.[11] The new procedure demonstrates that the prediction of total

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[9] The *initial* sample size is the same, (28) for any quantity between 299 and 1600 containers.

[10] At the time the article was written, Richard S. Frank, B.S. was the Chief of the Laboratory Operations Section for the DEA. Sidney W. Hinkley, Ph.D. was Chief of the Statistical Analysis Unit of the DEA, and Carolyn Hoffman, M.A. was the Chief of the Statistical Services Section of the DEA's Office of Planning and Policy Analysis.

[11] Because the DEA's testing protocols go to the reliability of factual determinations, not legislative choices, this Court need not perform a complicated retroactivity analysis.

quantity in this case was *un*reliable by the DEA's own definitions. Therefore, it constitutes an unconstitutional basis for a greater sentence than can be supported by reliable facts.

B. Sentences Must Be Based on Reliable Evidence

Factual determinations for purposes of sentencing need only be made by a preponderance of the evidence. *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 2419, 91 L.Ed.2d 67 (1986). Such findings must be upheld unless clearly erroneous. *Id.* While such a standard admittedly establishes fairly wide latitude, it is not the same as no standard at all. "[D]ue process concerns at the sentencing stage are that the *punishment not be based on unreliable information. . . .*" *United States v. Erves,* 880 F.2d 376, 379 (11th Cir. 1989) (emphasis added) (citing *Townsend v. Burke,* 334 U.S. 736, 740-41, 168 S.Ct. 1252, 1255, 92 L.Ed.2d 1690 (1948)).

Thus, under a preponderance standard, the principal concern is that the facts on which a sentence is based are reliable and sufficiently accurate to justify the severity of the sentence. *United States v. Patrick,* 983 F.2d 206, 208 (11th Cir. 1993) ("The burden of persuasion and production [] falls upon the Government as a matter of due process to establish not only the elements of the offense as defined by the legislature but also each aggravating factor upon which a harsher sentence is to be based."). *See also* U.S.S.G. § 6A1.3(a) (trial court may rely on any evidence, without regard to admissibility, provided it has "sufficient indicia of reliability.").

The Government's proof does not meet this standard. As the authors of the DEA procedure note, because the Sentencing Guidelines make quantity relevant to the length of sentences "it [is] all the *more critical* that the evidence be strong." *See id.* (emphasis added). Here, the Government never offered any explanation for the discrepancy between the DEA's official policies and the special analy-

sis performed for this case even though it purported to use the same methodology.

Moreover, the DEA's official policies represent the procedure which must normally be followed in all cases. As such, they are entitled to deference in the interest of promoting the uniformity and regularity which is the goal of the Sentencing Guidelines. *See e.g., Mistretta v. United States,* 488 U.S. 361, 368, 109 S.Ct. 647, 653, 102 L.Ed.2d 714 (1989). Deference to and preference for an agency's uniform testing procedure would advance that goal of uniformity of the application.

III. ANALYSIS OF THE FACTS DEMONSTRATE THAT REVIEW, OR REVERSAL AND REMAND, IS NECESSARY TO PREVENT A GRAVE MISCARRIAGE OF JUSTICE

Given Mr. Mena's health and age, he has been handed a life sentence. In light of the paucity of the evidence, the severity of the Government's misconduct, and the jury's verdict, a reasonable person reviewing this evidence could not help concluding that there was a reasonable possibility that the prosecutor's misconduct contributed to the conviction. This means that Mena's conviction was obtained in violation of his constitutional rights and, as such, cannot stand. To allow it to stand, particularly in light of the lengthy sentence imposed, would be a miscarriage of justice.

While it is clearly not the Court's usual function to correct individual errors, as opposed to setting broad based rules of general application, Rule 10.1(a) provides that granting the writ may be appropriate where "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial procedures, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." S.Ct. R. 10.1(a). Such review of an individual case is not unprecedented. *See, e.g., Thompson v. City of Louisville,*

362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960). *See alos, Wood v. Georgia*, 405 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) (where a particular constitutional violation is apparent on it face the Court may consider the issue, even where it is not raised by the parties).

As this Court noted in *Winship*, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the people in doubt whether innocent men are being condemned. *Winship*, 397 U.S. at 364, 90 S.Ct. at 1072-73. "A society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *Id.* 397 U.S. at 363-64, 90 S.Ct. at 1072. Therefore, Mena respectfully requests that this Court grant and review his petition.[12]

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[12] However, in such cases as this Court may also choose to summarily reverse and remand. *See Porat v. United States*, —— U.S. ——, 1155 S.Ct. 2604, 132 L.Ed.2d 849 (1995). Or, the Court may reverse with instructions to the Court of Appeals to conduct the appropriate harmless error review, a review which cannot be said with certainty to have been performed in this case since the court of appeals gave no reasons for its decision. Given the gravity of errors, such a review should have been performed. This Court has often taken this action in similar cases, preferring to remand the case to the appropriate court to perform the actual analysis rather than undertaking its own review. *See, e.g., Carella v. California*, 491 U.S. 263, 266-67, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (1989); *Rose v. Clark*, 478 U.S. 570, 580-81, 106 S.Ct. 3101, 3107-08, 92 L.Ed.2d 460 (1986) (*per curiam*).

CONCLUSION

The Petition for the Writ of Certiorari should be granted or, in the alternative, the case should be summarily reversed and remanded for a new trial or for an explicit harmless error review, on the grounds of the errors asserted herein.

Respectfully submitted,

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September 18, 1995

APPENDICES

APPENDIX A

[Filed Apr. 26, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5071

Non-Argument Calendar

D.C. Docket No. 90-852-CR-CCA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GREGORIO MENA,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(April 26, 1995)

Before HATCHETT, ANDERSON and CARNES, Circuit Judges.

PER CURIAM:

Affirmed. See Eleventh Circuit Rule 36-1.

APPENDIX B

[Filed Aug. 20, 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

90-0852-CR-ATKINS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GREGORIO MENA,
Defendant.

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

THIS CAUSE is before the court on defendant Gregorio Mena's Motion for New Trial, filed July 9, 1993. The defendant was charged with four counts arising from a cocaine importation scheme. After an eight day trial, the jury acquitted the defendant on three counts and convicted him on one importation count. In his motion for new trial, defendant alleges numerous instances of prosecutorial misconduct as grounds for a new trial. He also argues that the jury's verdict was contrary to the weight of the evidence.

Having carefully reviewed the motion and the relevant law, the court concludes that prosecutorial misconduct occurred during defendant's trial. Nevertheless, in light of the entire record, the court determines that the misconduct did not deprive defendant of a fair trial. The court further finds that the evidence supported the jury's verdict. Therefore, he is not entitled to a new trial.

DISCUSSION

A defendant is entitled to a new trial where prosecutorial misconduct is "so pronounced and persistent as to 'permeate the entire atmosphere of the trial' " and deprive the defendant of a fair trial. *United States v. Elkins*, 885 F.2d 775, 787 (11th Cir. 1989) (quoting *United States v. McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987)), *cert. denied*, 494 U.S. 1005 (1990). The defendant argues that he was prejudiced by numerous instances of misconduct on the part of the prosecutor. He claims that the prosecutor (1) improperly interfered with a defense witness; (2) elicited false testimony from its key witness, Tomas Garcia; (3) improperly attacked defense counsel during closing argument; and (4) impermissibly shifted the burden of proof to defendant during closing argument. We now consider each of the alleged instances of misconduct.

A. *Improper Interference with Defense Witness*

Defendant claims that the prosecutor made threatening remarks to defense witness Harry Morales on cross examination. Specifically, he argues that the prosecutor threatened Morales by questioning him about perjury, which resulted in Morales's false testimony about his knowledge of the compartments on the vessel where cocaine was found. However, after examining the transcript, it is clear that the prosecutor did not make the reference to perjury until *after* he elicited testimony from Morales that was favorable to the government. *See* Appendix to Motion for New Trial at A-26.

Morales's testimony on direct examination left the impression that Morales, Miguel and Tony had worked on the hidden compartments without Mena:

Q Now, tell the jury, Mr. Morales, how you helped Tony and Miguel build those compartments into the side of the ice hold?

A Simply, I helped them to build the sides of the boat. We put them together and then when we finished doing that, I was suspended from work. Two weeks later, once the ice hold was already finished and we were going to—we started doing the divisions—

Q By "divisions," you mean like the cabinets and the shelves inside there?

A Shelving.

Q Inside the hold?

A Inside the hold.

Q Did they tell you the purpose of why they were doing that?

A At no point in time.

Q Did you suspect why they were doing that?

A No.

Q Did you ever ask questions why they were doing that?

A Never, no.

Q Did you help them fiberglass over that portion of the boat?

A No.

Q But, in any event, Mr. Mena wasn't there at all during that time, was he?

A No.

Id. at 5-6.

On cross examination, the prosecutor showed Morales Government's Exhibit 6G, which depicted the compartments where the cocaine was found. Morales indicated that he did not recognize what was shown in the photograph. *Id.* at 13. He also testified as follows:

Q You were talking about shelves. What shelves were you talking about?

A When the boat left, it left with ice from the dock.

Q Yes

A When the ice is poured in, there are like little rooms like this, about six little rooms like this, and before the boat leaves the ice is poured into those partitions.

Q What you are saying is that the ice hold has different sections where ice is put in so you can separate what you put in each section? Is that what you are saying?

A True.

Q And when you said you worked on the side of the boat, on the outside or the inside of the boat?

A On the outside.

Q On the outside. You didn't work on the inside of the boat, did you?

A I worked on the inside of the hold also.

Q Did you make any shelves on the side of the boat?

A No, on the foam and on the sides of the boat.

Q Right. You put on the foam and the wood that is structurally the side of the boat, right?

A No, we put the foam on the side, and then I was suspended from work, and the division—the division was still to be made.

Q What do you mean by the "division"?

A The wall that goes toward the engine and the wall that goes toward the front.

Id. at 14. Morales further testified that he was not aware that the "shelves" where the cocaine was found had been put in the vessel. *Id.* at 18. Morales's testimony was favorable to the goverment because it dispelled the impression that only Morales, Miguel and Tony had worked on the hidden compartments and that Mena had not. It was not until after Morales testified that he was unaware of the cocaine compartments that the prosecutor asked him whether he was aware that perjury was a crime. *Id.* at 18. Contrary to defendant's assertion, the transcript reflects that the prosecutor questioned Morales about

perjury not to intimidate him, but to highlight the fact that he was telling the truth about his knowledge of the compartments.

To bolster his claim that Morales was intimidated by the reference to perjury, defendant points to Morales's testimony on redirect that he was afraid. *Id.* at 31. However, nothing in Morales's testimony indicates that he was afraid because of the prosecutor's reference to perjury. Indeed, Morales responded that he was afraid only after defense counsel asked him whether he knew he would have been arrested if he had gone on the trip with Miguel. *Id.*

In sum, the court finds defendant's contention that he was "deprived of an important defense witness by substantial and improper interference by the prosecutor" to be without merit.

B. *Eliciting False Testimony and Improper Vouching*

Defendant next argues that the government elicited false testimony from government witness Tomas Garcia when he testified that he had no specific agreement with the government. However, Garcia may have believed he had no specific agreement with the government given the lack of any assurance by the government regarding a specific sentence reduction. Therefore, it is inaccurate to characterize his testimony as false. In contrast, in the cases upon which defendant relies to support his argument that the prosecutor committed reversible error, *see, e.g., United States v. Eyster*, 948 F.2d 1196 (11th Cir. 1991), it was undisputed that the witnesses testified falsely. Moreover, Garcia testified that he signed the plea agreement, which was admitted into evidence and available to the jury during their deliberations.

Mena also argues that the prosecutor improperly vouched for Garcia's credibility. For prosecutorial conduct [*sic*] to exist, two prongs must be met: (1) the remarks

must be improper and (2) the remarks must prejudicially affect the substantial rights of the plaintff. Attempts to bolster a witness's credibility are improper if the government "argue[s] the credibility of a witness based on the government's reputation or allude[s] to evidence not formally before the jury." *Eyster*, 948 F.2d at 1206 (citation omitted). Here, the prosecutor referred to Garcia's testimony and the plea agreement, both of which were evidence before the jury. Therefore, at most, his comments would fall under the category of bolstering a witness's credibility based on the government's reputation. However, the Eleventh Circuit has found such bolstering to be permissible "if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon the government or its witnesses." *United States v. Avery*, 760 F.2d 1219, 1224 (11th Cir. 1985) (citation omitted). In this case, defense counsel implicated [*sic*] during cross-examination that Garcia was a liar. In addition, during his opening statement, defense counsel suggested that the government was engaged in a political war and that this case was part of it. Thus, while a close question, the court finds that the prosecutor's statements were made to rebut the defense counsel's assertions. Furthermore, even if the remarks were improper, they did not "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Eyster*, 948 F.2d at 1206 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

C. *Attacks on Defense Counsel*

Mena also argues that the prosecutor improperly attacked defense counsel during closing argument. In support of this argument, he points to various instances, particularly during the prosecutor's rebuttal, which were inappropriate. For example, the prosecutor referred to defense counsel as a "manipulator of words," Appendix to Motion for New Trial at D-79, as "insulting the jury's intelligence," *id.* at D-80-81. He further stated that de-

fense counsel was "not seeking the truth." The court sustained defense counsel's objections to the remarks.

While the court finds that the prosecutor's remarks were improper, it is important to note that they were made during rebuttal in response to remarks made by the defense counsel which questioned the government's integrity. The Eleventh Circuit has held that the potential harm from a prosecutor's improper remarks is mitigated by the jury's understanding that the prosecutor was countering the defense counsel's attacks on the prosecution. *United States v. Lopez*, 898 F.2d 1505, 1512 (11th Cir. 1990) (citing *United States v. Stefan*, 784 F.2d 1093, 1100 (11th Cir. 1986)). For example, in *Lopez*, the court determined that the prosecutor's improper remark did not violate the defendant's substantial rights because the remark occurred during rebuttal in response to improper remarks by the defense counsel. *Lopez*, 898 F.2d at 1512. The *Stefan* court reached a similar conclusion where the prosecutor's remarks were made in response to the defense counsel's attacks on the prosecution's integrity. *Stefan*, 784 F.2d at 1100.

In the present case, defense counsel suggested that the government's case against defendant was part of a political war and an "abuse of power." *Id.* at 77-78. As the transcript reflects, the prosecutor began his rebuttal by stating that the comments he was about to make were in response to defense counsel's comments:

> And what I'm going to talk about is, I'm going to talk about it because of what has been said by Mr. Munroe.
>
> And what I want to say that is, I wouldn't say certain things about what Mr. Munroe said unless he had brought them up.
>
> Now, I don't care what you say. He's saying that the United States Government, through me, is bringing a concocted case against Mr. Mena.

Id. at 78. Here, as in *Lopez* and *Stefan*, the prosecutor's remarks occurred during rebuttal and were clearly in response to defense counsel's remarks about the government. Therefore, while the procecutor's remarks were improper, under the circumstances of this case, they did not violate the defendant's substantial rights.

D. *Improper Burden Shifting*

Finally, Mena argues that the government's comments regarding the burden of proof amounted to prosecutorial misconduct. During closing, the prosecutor made several references to the lack of evidence that the defendant was not involved in the importation scheme. Additionally, the prosecutor incorrectly stated that "reasonable doubt" did not mean a "frivolous doubt"; the court sustained defense counsel's objection and advised the jury that the court would instruct the jury on the law.

The prosecutor's comments regarding the absence of evidence that Mena did not participate in the crime impermissibly shifted the burden of proof to the defendant, thereby violating the sacrosanct principle that a criminal defendant has no duty to produce exculpatory evidence. *See United States v. Casamayor*, 837 F.2d 1509, 1516 (11th Cir. 1988), *cert. denied*, 488 U.S. 1017 (1989). The court finds that these comments amounted to prosecutorial misconduct. *See Dobbs v. Kemp*, 790 F.2d 1499, 1504 (11th Cir. 1986).

E. *Cumulative Effect of Prosecutorial Misconduct*

Having concluded that the prosecutor's remarks about defense counsel and the comments regarding the burden of proof amounted to prosecutorial misconduct, the next consideration is whether that conduct was "so pronounced and persistent as to permeate the entire atmosphere of the trial" and deprive defendant of a fair trial. *United States v. Elkins*, 885 F.2d 775, 787 (11th Cir. 1989) (quotation omitted), *cert. denied*, 494 U.S. 1005 (1990).

After considering the entire record, the court concludes that it was not.

First, the instances occurred during a multi-day trial. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940). Second, the court sustained defense counsel's objections to the prosecutor's remarks and statement regarding the burden of proof and clearly instructed the jury that the burden of proof was on the government, not the defendant. *See United States v. Reed,* 887 F.2d 1398, 1402 (11th Cir. 1989) (prejudicial remark may be rendered harmless by curative instruction). Third, as discussed above, the prosecutor's remarks about defense counsel were made during rebuttal to counter defense counsel's remarks about the government. Fourth, contrary to defendant's assertion, the weight of the evidence was against the defendant. Fifth, the Eleventh Circuit has held that similar comments by a prosecutor about the burden of proof did not warrant the granting of a new trial. *United States v. Hendrieth,* 922 F.2d 748 (11th Cir. 1991). In sum, viewing the entire record, the court concludes that the prosecutorial misconduct was insufficient to deprive defendant of a fair trial.

CONCLUSION

In light of the foregoing, it is ORDERED AND ADJUDGED that defendant's Motion for New Trial is *DENIED.*

DONE AND ORDERED at Miami, Florida, this 19th day of August, 1993.

/s/ C. Clyde Atkins
Senior United States District Judge

cc: all counsel of record

APPENDIX C

[Filed Jun. 20, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5071

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GREGORIO MENA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

BEFORE: HATCHETT, ANDERSON, and CARNES, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by appellant is denied.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge